88-1436 (1)

NO._____

Supreme Court, U.S.
FILED
FEB 28 1989
JOSEPH F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

RICHARD L. FINCHER,

Petitioner,

VS.

JANE D. FINKBOHNER,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT

PETITION FOR CERTIORARI

OF COUNSEL

RICHARD L. FINCHER,
P.O. BOX 1294,
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PETITIONER, PRO SE
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SERVICE ON

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SUITE 131, MONTGOMERY BUILDING, 2562 EXECUTIVE CENTER CIRCLE, EAST,
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COUNSEL FOR RESPONDENT
PH. (904)488-6705

QUESTIONS PRESENTED FOR REVIEW

(1) This case involves the question as to whether or not government has failed to honor the last clause of the First Amendment to the United States Constitution, "the right of the people peaceably to assemble, and to petition the government for a redress of grievances",? when the judicial branch of state government fails to afford a Plaintiff a trial to address the genuine disputed issues of material fact regarding his/her Complaint; but instead dismisses Plaintiff/Appellant's Complaint (on the first amended Complaint) "with prejudice" solely alleging failure to state a cause of action, where the basis therefor is not a part of the record (no basis therefor whatsoever) and then the state appeals Court Affirms Per Curiam without Opinion, or other explanation.

(2) Can the judicial branch of the state of Florida justify depriving Petitioner/Appellant the right to access to its' Courts, and the right to trial by jury (when common law interest is involved) as exemplified by the 7th

Amendment to the United States Constitution and applied through Article VI thereof to the State Judicial branches ? Those rights are also secured by the Florida Constitution, Article I Sections 21 and 22 respectively.

(3) Whether or not, it is Constitutionally fair to allow a single Judge (subject to such Judge's individual discretion) to determine whether or not a Plaintiff will be afforded a trial on the genuine disputed issues of material fact raised by such Plaintiff's Complaint ?

(a) Does an exercise of discretion (by a single Judge) which deprives a Plaintiff of a trial, afford such Plaintiff Due Process of Law as exemplified by the 5th and 14th Amendments to the United States Constitution and applied through the 1st. Amendment thereto ?

(b) How can a private individual's right to access to our Courts and the right to trial be legally valid, if the decision as to whether or not such individual will be allowed to exercise such rights, is left to the (individual whims) - discretionary decision of a single judge ?

(c) Although those rights are asserted by our federal and state Constitutions; do individuals (under current judicial policies) actually enjoy those rights thereunder ?

(d) If the 1st., 5th, 7th, and 14th Amendments to the U.S. Constitution (applied to state judicial branches through Article VI Clause 2 thereof) secures those rights thereunder; then how can those rights be enforced, unless the judicial branches of state governments are disciplined by the Supreme Judicial Authority of our land (the U.S. Supreme Court) in support of the supreme law of our land, the Constitution of the United States ?

(4) Whether or not, it is Constitutionally fair for a 3 Judge panel of a State appeals Court to arbitrarily affirm such single Judge's exercise of discretion (which deprives a Plaintiff of a trial, without explanation) with a Per Curiam Affirmance without Opinion, or explanation whatsoever ?

(a) How can Title 42 USC Sections 1983, and 503(a)(3) be enforced if such is made impossible?

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OPINIONS BELOW

(1) The Decision filed 11/15/88 by the Fifth District Court of Appeal, State of Florida simply stated PER CURIAM AFFIRMED, without stating anything further except the names of three Judges who concurred.

(a) The Order from that Court dated 12/20/88 simply stated "ORDERED that Appellant's MOTION FOR REHEARING, filed 11/23/88, is denied;" without any further statement of explanation.

(2) The Final Order (dated 2/23/88) from the Circuit Court of the Ninth Judicial Circuit, Orange County, Florida simply stated, "Defendant's Motion to Dismiss is granted in that Plaintiff has failed to state a cause of Action upon which relief can be granted. This action is, accordingly, "dismissed with prejudice." "DONE and ORDERED this 23 day of February, 1988, in Orlando, Orange County, Florida." "LAWRENCE R. KIRKWOOD Circuit Court Judge." That Order is from the Court of first instance.

JURISDICTION

The Judgment Decision of the Fifth District Court of Appeal, State of Florida which affirmed (Per Curiam) the State Circuit Court's Order, was filed on 11/15/88. Petitioner filed Motion for rehearing on 11/23/88. The Court issued an Order denying said Motion on 12/20/88. The Final Order from the State Circuit Court was rendered on 2/23/88, Case # CI 87-7441. A Notice of Appeal to this Court was filed in the State Appeals Court (Case # 88-514) on January 3, 1989 and this Petition was filed on 2/28/89 within the time limitation allowed by law. The Jurisdiction of this Court is invoked under Title 28 USC Sec. 1257(a) because Rights claimed under the Constitution and laws of the United States are drawn into question, which are questions of substantial substance. Petitioner, hereby formally request this Court to grant certiorari for a full and complete review of the state Appeals Court's decision in Case No. 88-514.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

"The right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment provides in pertinent part:

"Nor be deprived of life, liberty, or property, without Due Process of Law:"

The Seventh Amendment provides in pertinent part:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The Fourteenth Amendment provides in pertinent part, Section 1:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without Due Process of Law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VI (clause 2) of the United States Constitution provides in pertinent part:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

Title 42 USC Sec. 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 42 USC Sec. 503(a)(3) provides in pertinent part:

"Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied:

STATEMENT OF CASE

(1) This case involves a dispute between Petitioner/Mr. Fincher and Appellee/Respondent Ms. Finkbohner over the fairness and constitutionality of an administrative hearing she conducted (as an administrative law judge at the federal level) wherein Petitioner asserted and asserts with substantial veracity that, she victimized Petitioner by participating in that hearing (on behalf of the Agency) wholly outside of her jurisdictional authority and range of delegated discretion (with malicious purpose and in a manner exhibiting a wanton, and wilful disregard for human rights) whereby she deprived Petitioner of rights secured by the Constitution of the United States (to wit, Equal Protection of the Laws and procedural Due Process of Law):

(2) On 12/16/87 Petitioner filed his first amended pleading (case No. CI 87-7441) in the Court of first instance (Circuit Court of Orange County, Florida) titled, Complaint for Redress of Defendant's Unlawful Interference with Plaintiff's Common Law Interest, Jury

Trial Requested (Record 132 - 154). In that pleading document averments 9, 10, and 15 raised the federal questions as to whether Respondent deprived Petitioner of Equal Protection of the laws, Procedural Due Process of law, and afforded him the opportunity provided by Title 42 USC Sec. 503(a)(3). Those averments assert that, Appellee/Respondent extended preferential (different) treatment to the other party to the administrative hearing she conducted,by assigning greater credibility to fraudulent, variable conflicting testimony, in lieu, of assigning an equal amount thereof to Petitioner's testimony, and basing her decision solely upon that fraudulent testimony, without any evidence to refute the rejected testimony or corroborate the accepted testimony. Those specific acts of bad faith by Respondent are evinced by supporting averments 17, 18, 19, 21, and 22, and quotes from the transcript of that hearing, which fairly evince Respondent's bad faith conduct whereby she deprived Petitioner of his constitutionally protected rights.

That initial Pleading (filed in state Circuit Court) is a Common Law - Civil Rights suit seeking an Order enjoining Appellee from participating in the Administrative Process, and also a possible Civil Penalty as relief.

(3) On 1/5/88, Appellee's Motion seeking dismissal was filed (Record 156 - 159). On 1/13/88 Appellant's opposing Motion was filed (Record 160 - 166). On 2/15/88 the Motions were brought on to be heard before Circuit Judge Lawrence R. Kirkwood, and were heard in a 15 minute hearing. The genuine disputed issues of material fact were not litigated during that hearing (Record 1 - 21). During that hearing the federal questions of Equal Protection and Due Process of Law; and the 1St. Amendment (access to Courts) Right to Petition, Civil Rights questions were raised. During that hearing Petitioner asserted (with substantial veracity) that, Appellee's breach of her Oath of Office deprived him of his Rights, and questioned the Constitutionality and fairness of the Administrative hearing she conducted,

thereby raising questions of Equal Protection, Due Process of Law, and the rights provided by Title 42 USC Sec. 503(a)(3). In the Transcript Record, Page 10 lines 1,2,3,6,7, Page 15 lines 18 - 25, Page 16 lines 1 - 3, and on lines 10 - 14 Petitioner asserted that his Complaint stated specifically, what overt acts of bad faith Appellee engaged in which deprived him of his rights and interfered with his Common Law Interest. On page 11 lines 18 - 23 Petitioner asserted that, Appellee's Motion is an attempt to prevent the Court or any forum from addressing the genuine disputed issues of material fact raised by his Complaint, and also Page 14 lines 3 - 9, thereby raised the 1St. Amendment question (right to petition clause which protects the right to access to Courts). Again the 1St. Amendment question is raised at the close of the hearing, when judge Kirkwood stated that, the Motion to dismiss will be granted with prejudice (which is not a proper official dismissal), and Petitioner asked him what was the basis for that and he simply

stated, I have made my ruling. Court is in recess. In the transcript, page 19 lines 13, 14, 17 - 22. On 2/24/88, Judge Kirkwood entered an Order dismissing Petitioner's cause "with prejudice" (Record 167), and on 3/14/88, Petitioner filed his Notice of Appeal to the state Fifth District Court of Appeal (Record 168).

(4) In May of 1988, Petitioner filed his Opening Brief in the Appeals Court. In that Brief on page 4 Section (1), Federal Constitutional questions of Article VI Clause 2, and the 1St. Amendment were raised when Petitioner asserted that, "under our Federal Rules of Civil Procedure, the standard most frequently applied test, is that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to any relief".

(5) On 6/9/88 Appellee's Answer Brief was filed. That Brief failed to address the

disputed legal issues before the Court, but instead attempted to raise immunity questions of quasi-judicial Officer immunity. That entire Brief is primarily devoted to raising and arguing those questions, eventhough they are not a part of the trial Court's dismissal Order. On 6/28/88, Appellant's Reply Brief was filed. That Brief is primarily devoted to rebuttal of Appellee's Answer Brief. It also reiterates the material points raised by Petitioner's initial Complaint in trial Court, and again raises Federal Constitutional questions of the 1St. and 7th Amendments when Petitioner asserted on page 5 Section 6, "However, when Clear and Convincing evidence has not been considered, and in this case has been rejected and circumvented, there can not be a final resolution unless and until such evidence is considered and disposed of by a jury". "but thus far in these proceedings no forum has addressed Appellant's dispute of Appellee's Unconstitutional conducting of her hearing wherein she victimized Appellant.

(6) On 11/15/88, The Court below (state appeals court) filed its' Decision, a PER CURIAM AFFIRMED without opinion, which is regarded as final by the Florida Supreme Court. On 11/23/88, Petitioner filed his MOTION FOR REHEARING. That pleading again raised Federal Constitutional questions of the 1St. and 7th Amendments, when Petitioner asserted in sections 1,4, and 5 of that document. "There is not any precedent record, or statutory code which could be used as a supporting basis for Judge Kirkwood's decision". "What Judge Kirkwood's decision amounts to, is a deprivation of Appellant's right to access to our Courts, and the right to trial by jury". "Judge Kirkwood's decision failed to meet the criteria legally necessary as a basis for his dismissal decision". On 12/20/88, the Court below filed its' Order, denying Petitioner's Motion, and on 1/3/89, Petitioner filed in the Court below his Notice of Appeal to this Court, and this Petition ensued.

ARGUMENT

(1) The Court infra did not address the Federal questions, or pass upon them in any manner; nor did the trial Court. They simply rendered arbitrary decisions without explanation. The Respondent arbitrarily exercised discretion without lawfully setting forth an acknowledgement and explanation therefor, which is required by the Florida Administrative Code and Florida Administrative Procedure Act; the same as required by the Federal Administrative Procedure Act. Amos Treat & Co., Inc, et al V. Securities and Exchange Comm., et al,306 F.2d 260 (1962): The Court held that, with respect to Agency adjudicatory proceedings,due process requires resolution of contested question by impartial and disinterested tribunal. Fair trial in a fair tribunal, with absence of bias, is basic requirement of due process, and law endeavors even to prevent probability of unfairness. This theory has thus far in these proceedings, not been applied at any level.

(2) Our democracy is founded upon the sovereignty of the individual, therefore, in light of this very critical basic concept of our democratic system of government, it seems that the individual should be afforded the highest degree of respect and preference, if our democracy will be allowed to continue to exist by the people and for the people. Our Constitution must be honored (especially with respect to individual rights) or our democracy will inevitably cease to exist as we know it. Should government now disregard these basic critical concepts, and reduce our Constitution to a mere door mat? This case puts these basic concepts at issue, and should be settled, in the best interest of justice, which would restore public faith and confidence in the fairness of our judicial system.

(3) This case draws into question, whether or not litigants in the state judicial system of Florida, are afforded the right to fair and impartial equal access to its' Courts, fair and impartial litigation without bias,

and the right to trial by jury. These rights are among the most critical basic rights afforded by the Constitution of the United States (a contract between government and the people), and are a critical concept of our democratic system of justice (equal justice for all) in our democratic system of government. These rights are protected by the 1St. and 7th Amendments to the United States Constitution. Morales V. Turman, D.C. Tex. 1971, 326 F.Supp. 677: Due Process right to access to the Courts and the right to petition Officials and Courts for redress of grievances are fundamental rights which cannot be infringed upon; without a showing of compelling state interest. Pizzolato V. Perez, D.C.La. 1981,524 F.Supp. 914: Access to the Courts is protected by the 1St. Amendment right to petition for a redress of grievances. (U.S.C.A. Const. Amend 1) Article VI Clause 2 thereof binds states to honor the United States Constitution and laws. Hines V. Davidowitz supra, 61 S.Ct. 404, Capital Cities Cable, Inc. V. Crisp, 104 S.Ct.

2694, 2700, Richards Furniture Corp. V. Board of County Comm'rs of Anne Arundel County, 1963, 196 A.2d 621, 233 Md. 249: The right to Petition guaranteed by this Amendment has been extended so as to prevent its denial by the states. If government at any level is allowed to infringe upon these critical rights, then our democracy will inevitably cease to exist. If a single judge is allowed to arbitrarily decide whether or not a litigant will be afforded access to our Courts, and trial by jury, then our Constitution will become worthless. Should an Administrative Hearing Officer such as the Respondent in this case be allowed to deprive an individual of Equal Treatment, and arbitrarily compile a record based on fraud, and render a decision based on that record without fear of consequences? The Respondent's record must be corrected. In the case of Hobbie V. Unemployment Appeals Comm. of Florida, et, al, 106 S.Ct. 1633 (1986), No. 85-933; an Administrative Hearing Officer such as the Respondent in this case arbitrarily

distorted and misapplied the 1St. Amendment to the U.S. Constitution, and deprived Ms. Hobbie of her rights. The Florida Fifth District Court of Appeal routinely arbitrarily Per Curiam Affirmed (without Opinion), but fortunately for all citizens, and in the best interest of justice, this Court reversed that arbitrary affirmance. The Respondent (in this case) has not shown any compelling state interest which could justify depriving Petitioner of his rights.

(4) The only relief sought by Petitioner from this Court, is an Order for a jury trial of the disputed issues of material fact raised by his pleadings and/or any other relief deemed just and appropriate. Petitioner believes Florida owes him that duty. Petitioner's desire, is to confront the Respondent in open Court before a jury of his peers. Petitioner believes this case involves questions of substantial substance and considerable public importance and concern. Therefore Petitioner prays that this Court will grant Certiorari.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, That a true copy of the foregoing Petition and following Appendix has been furnished by regular U.S. Mail to Mr. Dan F. Turnbull, Jr., at Suite 131, Montgomery Building, 2562 Executive Center Circle, East, Tallahassee, Florida 32399-0657 this 28 day of February, 1989.

COUNSEL FOR RESPONDENT

RESPECTFULLY SUBMITTED

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Ph. (407)846-2387

APPENDIX

Page(s)

Decision of the Florida District Court of Appeal, Fifth District, July Term.....-B 1-

Order from the Florida District Court of Appeal (Fifth District), denying Petitioner's Motion for rehearing of its' Decision, filed on November 15, 1988, in Case No. 88-514, Order filed 12/20/88...-B 2-

Final Order from the Circuit Court of the ninth judicial circuit, Orange County, Florida (filed on February 23, 1988), dismissing Petitioner's Complaint "with prejudice".....-A 1-

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT,
ORANGE COUNTY, FLORIDA.

RICHARD L. FINCHER,
Plaintiff,

VS. CASE NO. CI-87-7441

JANE D. FINKBOHNER
Defendant.

FINAL ORDER

This matter came on for hearing before the undersigned on February 15, 1988 in Orlando, Orange County, Florida, on Defendant's Motion to Dismiss and Plaintiff's Amended Complaint. Being fully apprised in these premises, Defendant's Motion to dismiss is granted in that Plaintiff has failed to state a cause of action upon which relief can be granted. This action is, accordingly, dismissed with prejudice.

DONE and ORDERED this 23 day of February, 1988, in Orlando, Orange County, Florida.

LAWRENCE R. KIRKWOOD
Circuit Court Judge

Copies mailed to:
Richard Fincher
Dan F. Turnbull, Jr.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT JULY TERM 1988

RICHARD L. FINCHER,

Appellant,

V.

JANE D. FINKBOHNER,

Appellee.

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED DISPOSED OF.

CASE NO.: 88-514

Decision filed November 15, 1988

Appeal from the Circuit Court
for Orange County,
Lawrence R. Kirkwood, Judge.

Richard L. Fincher, pro se,
Kissimmee.

Dan F. Turnbull, Jr., Assistant
General Counsel, Florida Department
of Labor and Employment Security,
Tallahassee, for Appellee.

PER CURIAM

AFFIRMED

COBB and DANIEL, JJ., and NORRIS, W. A., JR.,
Associate Judge, concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

RICHARD L. FINCHER,

Appellant,

V. CASE NO. 88-514

JANE D. FINKBOHNER,

Appellee.

DATE: December 20, 1988

BY ORDER OF THE COURT:

ORDERED that Appellant's MOTION FOR REHEARING, filed November 23, 1988, is denied.

I hereby certify that the foregoing is (a true copy of) the original court order.

FRANK J. HABERSHAW, CLERK

BY: _____
Deputy Clerk

(COURT SEAL)

cc: Dan F. Turnbull, Jr., Esq.
Richard L. Fincher